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No. 86-3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SUZANNE LINDLEY DALY,
Petitioner,

v.

NAN TOEWS DALY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF AMICUS CURIAE STATE OF NEVADA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the petitioner challenge the constitutionality of a statute on its face for the first time in this Court?

2. Is Nevada Revised Statute 128.105 (4) sufficiently definite to be held constitutional?

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STATEMENT OF THE CASE

The petitioner asks for a writ of certiorari to review proceedings in the Nevada State Supreme Court in which termination of her parental rights was affirmed on the ground that return of her child to her would result in serious emotional injury to the child. The basis for this holding was that serious emotional injury had already occurred to the child as a result of her father's (the petitioner) sex reassignment operation and the reaction of the child to such a change of sex and because the child felt she had lost her father, that is, he was dead.

The petitioner challenges the facial constitutionality of NRS 128.105(4) for the first time in this court. In the Nevada Supreme Court she challenged the whole termination of parental rights

Had the petitioner in this proceeding attacked any part of NRS Chapter 128 as facially invalid, she would have had to serve the Attorney General of the State of Nevada with a copy of the proceeding. The Attorney General would have been entitled to be heard because petitioner would have been seeking to have the statute declared unconstitutional on its face. See NRS 30.130, which reads in relevant part:

> . . . In any proceeding [where a] statute, . . . is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.

In that event, the Attorney General of the State of Nevada would have had an opportunity to fully brief the question of the validity vel non of Chapter 128 of the Nevada Revised Statutes, or any portion thereof, under facial attack for vagueness in the Nevada courts.

The petitioner in this proceeding should not now be permitted to raise for

the first time an attack on the facial validity of NRS 128.105(4).

In Street v. New York, 394 U.S. 576 (1969), the Court said at pages 581, 582:

> The New York Court of Appeals did not mention in its opinion the constitutionality of the "words" part of §1425, subd. 16, par. 4. Hence, in order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it. See 28 U.S.C. §§1257 (2), 1257(3); Bailey v. Anderson, 326 U.S. 203, 206-207, 66 S.Ct. 66, 68, 90 L.Ed. 3 (1945). Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. [Citations omitted.]

Suzanne Daly failed to raise the question of the validity on its face of

NRS 128.105(4) in the courts of Nevada. What she did do was mount an attack in the Nevada Supreme Court on the constitutionality of NRS Chapter 128 as applied to her. That is an insufficient basis for challenging the facial validity of NRS 128.105(4) in this Court. The Nevada courts have not had an opportunity to review the question of the facial validity of the statute. It is therefore respectfully submitted that this Court should deny certiorari to review this question.

II

NRS 128.105(4)
IS PRESUMPTIVELY VALID

In Davies Warehouse Co. v. Bowles, 321 U.S. 144, 153 (1944), the Court held: ". . . State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared. . . ."

In U.S. v. Carolene Prods. Co., 304

U.S. 144 (1938), the Court stated that in a similar case involving a claim of unconstitutionality under the Fourteenth Amendment the Court had upheld the State statute. The Court then said at page 148:

> We see no persuasive reason for departing from that rule here, where the Fifth Amendment is concerned; and since none is suggested, we might rest decision wholly on the presumption of constitutionality.

See also Childs v. Childs, 419 N.Y.S.2d 533, 540 (1979), cert. den. and app. dismissed, 446 U.S. 901 (1980), where the court said:

> [A]n appellate court has an obligation to pursue every reasonable path of reconciliation of the challenged statute consistent with the Constitution rather than setting it aside. In this regard, it is commonly said that every presumption in favor of the statute will be indulged, every effort made to construe ambiguous language so as not to conflict with fundamental law. [Citations omitted.] . . . [U]nder appropriate circumstances, a court may read a statute expansively, or in tandem with other statutes, so as to prevent serious damage to overriding public

policy [Citations omitted]. . . .

NRS 128.105(4) is entitled to a strong presumption of constitutionality unless petitioner affirmatively shows that it is invalid.

III

NRS 128.105(4) IS
NOT UNCONSTITUTIONALLY VAGUE

The statute in the case at bar is designed for the protection of children and is as definite as it is possible to make a statute dealing with termination of parental rights to prevent serious harm to children from the conduct of their parent or parents. In U.S. v. Petrillo, 332 U.S. 1, 7 (1946), this Court held:

> . . . The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured

> by common understanding and practices. The Constitution requires no more.

Kolender v. Lawson, 461 U.S. 352, 357, 358 (1983), quoted from by petitioner, does not change the rule stated in Petrillo, supra, for there the court cited to Petrillo with approval. Moreover, the statute challenged in Kolender was a loitering statute, historically subject to successful challenge as void for vagueness. The Court pointed out that its concern was based upon the potential for arbitrarily suppressing First Amendment freedoms and that in addition the loitering statute under attack in that case implicated consideration of the constitutional right to freedom of movement. p. 358. Neither factor is a consideration in the case now sought to be reviewed by the Supreme Court.

A case more on point to the instant situation is People v. D. A. K., 198 Col.

11, 596 P.2d 747, appeal dismissed 444 U.S. 987 (1979). This was a case in which a mother whose child was declared neglected and dependent challenged the statute which provided that "[a] neglected or dependent child is one whose parent has subjected him or her to 'mistreatment or abuse.'" p. 750. The court construed the statute to include both physical and emotional abuse. The court said at page 751:

> While acknowledging that the possible consequences of adjudicating a child to be neglected or dependent can be grave, we hold that the statute gives the parents sufficient notice of the kinds of conduct which could result in their losing their parental rights. An ordinarily reasonable parent can understand what it means to "abuse" and "mistreat" a child. Fundamental fairness does not require a statute to enumerate in all encompassing examples, or exactly described acts, precisely how poorly a parent can treat a child before risking loss of parental rights. [Citation omitted.] . . .

> Furthermore, the statute is as explicit as could be in order to accomplish the purposes intended [the protection of children]. U.S. v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1946). The protection of an abused or mistreated child is an area of legitimate legislative concern which does not lend itself to more precise definition. A legislature would find it extremely difficult, if not impossible, to write a statute more specific to accomplish the purposes of protecting the child's safety and welfare while still allowing the juvenile court reasonable flexibility in determining the best interests of the child and society in each case.

This Court has expressed the same philosophy in Smith v. Goguen, 415 U.S. 566 (1974): "There are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. . . ." See also Arnett v. Kennedy, 416 U.S. 134 (1974), reh. den. 417 U.S. 977 (1974). The protection of children from seriously injurious conduct by their

parents is one such area, and NRS 128.105 (4) is a statute dealing with such an area. An ordinarily reasonable parent can determine what actions are sufficient to present a risk of serious emotional or mental injury, as set forth in NRS 128.105 (4). NRS 128.105(4) provides:

> An order of the court for termination of parental rights may be made on the grounds that the termination is in the child's best interest in light of the considerations set forth in this section and NRS 128.106, 128.107 and 128.108:
>
> . . .
>
> 4. Risk of serious physical, mental or emotional injury to the child if he were returned to, or remains in the home of, his parent or parents;

It is clear from this language that if a parent creates a situation which would result in serious physical, mental or emotional injury to the child if he were returned to the home of his parent, as established by the evidence presented at trial, the parental rights of the parent

may be terminated.

NRS 128.105(4) may not be read in a vacuum. Nevada Revised Statutes Chapter 128 must be considered in its entirety. The definition of injury in NRS 128.013 and mental injury in NRS 128.0137 provide a standard which requires proof of the injuries mentioned in NRS 128.105(4). NRS 128.0137 defines mental injury as "an injury to the intellectual or psychological capacity of a child as evidenced by an observable and substantial impairment in his ability to function within his normal range of performance and behavior."

Proof of injury or risk of serious injury would have to be established by clear and convincing evidence before a termination of parental rights could be granted. See NRS 128.090(2); Santosky v. Kramer, 455 U.S. 745 (1982); and Cloninger v. Russell, 98 Nev. 597, 598, 655 P.2d 528 (1982).

In addition, under NRS 128.105 specific considerations obtaining in other sections of the chapter are to be considered. For instance, NRS 128.106(2) provides that the court may consider conduct toward a child of an emotionally cruel or abusive nature. Under NRS 128.107(2) the court may consider the physical, mental or emotional condition and needs of the child and his desires regarding the termination, if the court determines he is of sufficient capacity to express his desires. It is therefore clear that there are standards set forth for the application of NRS 128.105(4) and it is not vague.

In Roth v. U.S., 354 U.S. 476 (1957), the appellants argued that certain obscenity statutes did not provide reasonably ascertainable standards of guilt and therefore violated the constitutional requirements of due process. The court

said at page 491:

> Many decisions have recognized that these terms of obscenity statutes are not precise. The Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ". . .[T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ." U.S. v. Petrillo, 332 U.S. 1, 7-8. . . .

The Court went on at page 491 to say:

> . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." Id. at 7. [Citations omitted.]

At most, the instant case is a marginal case based on the facts presented. NRS 128.105(4) is itself clearly sufficiently definite to be held constitutional on its face. Therefore, the Petition for Writ of Certiorari should

be denied.

CONCLUSION

It is respectfully submitted by the State of Nevada that the Petition for Writ of Certiorari should be denied. The petitioner failed to challenge the validity of NRS 128.105(4) in the Nevada Supreme Court and thus has failed to exhaust a potential State remedy and has waived the argument. Additionally, the statute in question establishes sufficient warning of the conduct that may result in termination of parental rights that an ordinary person exercising ordinary common sense can understand what is

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expected. The statute is not unconstitutionally vague and certiorari should not issue.

DATED: August 5, 1986

Respectfully submitted,

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APPENDIX

NRS 30.130 Parties. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.

[11:22:1929; NCL §9450]

NRS 128.013 "Injury" defined.

1. "Injury" to a child's health or welfare occurs when the parent, guardian or custodian:

(a) Inflicts or allows to be inflicted upon the child, physical, mental or emotional injury, including injuries sustained as a result of excessive corporal punishment;

(b) Commits or allows to be committed against the child, sexual abuse as defined in NRS 432B.100;

(c) Neglects or refuses to provide for the child proper or necessary subsistence, education or medical or surgical care, although he is financially able to do so or has been offered financial or other reasonable means to do so; or

(d) Fails, by specific acts or omissions, to provide the child with ade-

quate care, supervision or guardianship under circumstances requiring the intervention of the welfare division of the department of human resources or a county agency authorized by the juvenile court to receive and investigate reports of abuse or neglect of a child pursuant to NRS 432B.300, or of the court itself.

2. A child's health or welfare is not considered injured solely because his parent or guardian, in the practice of his religious beliefs, selects and depends upon nonmedical remedial treatment for the child, if such treatment is recognized and permitted under the laws of this state.

(Added to NRS by 1981, 1750; A 1985, 1397)

NRS 128.0137 "Mental injury" defined. "Mental injury" means an injury to the intellectual or psychological capacity of a child as evidenced by an observable and substantial impairment in his ability to function within his normal range of performance and behavior.

(Added to NRS by 1981, 1751)

NRS 128.090 Hearing; evidence; postponement.

1. At the time stated in the notice, or at the earliest time thereafter to which the hearing may be postponed, the court shall proceed to hear the petition.

2. The proceedings are civil in nature and are governed by the Nevada Rules of Civil Procedure. The court shall in all cases require the petitioner to establish the facts by clear and convincing evidence and shall give full

and careful consideration to all of the evidence presented, with regard to the rights and claims of the parent of the child and to any and all ties of blood or affection, but with a dominant purpose of serving the best interests of the child.

3. Information contained in a report filed pursuant to NRS 432.100 to 432.130, inclusive, or chapter 432B of NRS may not be excluded from the proceeding by the invoking of any privilege.

4. In the event of postponement, all persons served, who are not present or represented in court at the time of the postponement, must be notified thereof in the manner provided by the Nevada Rules of Civil Procedure.

[9:161:1953]--(NRS A 1969, 95; 1981, 1754; 1985, 128, 1398)

NRS 128.105 Grounds for terminating parental rights: Basic considerations. An order of the court for termination of parental rights may be made on the grounds that the termination is in the child's best interest in light of the considerations set forth in this section and NRS 128.106, 128.107 and 128.-108:

1. Abandonment of the child;

2. Neglect of the child;

3. Unfitness of the parent;

4. Risk of serious physical, mental or emotional injury to the child if he were returned to, or remains in, the home of his parent or parents;

5. Only token efforts by the parent or parents:

(a) To support or communicate with the child;

(b) To prevent neglect of the child;

(c) To avoid being an unfit parent; or

(d) To eliminate the risk of serious physical, mental or emotional injury to the child; or

6. With respect to termination of the parental rights of one parent, the abandonment by that parent.

(Added to NRS by 1975, 964; A 1981, 1755; 1985, 244)

NRS 128.106 Specific considerations in determining neglect by or unfitness of parent. In determining neglect by or unfitness of a parent, the court shall consider, without limitation, the following conditions which may diminish suitability as a parent:

1. Emotional illness, mental illness or mental deficiency of the parent which renders the parent consistently unable

to care for the immediate and continuing physical or psychological needs of the child for extended periods of time.

2. Conduct toward a child of a physically, emotionally or sexually cruel or abusive nature.

3. Excessive use of intoxicating liquors, controlled substances or dangerous drugs which renders the parent consistently unable to care for the child.

4. Repeated or continuous failure by the parent or parents, although physically and financially able, to provide the child with adequate food, clothing, shelter, education or other care and control necessary for his physical, mental and emotional health and development, but a person who, legitimately practicing his religious beliefs, does not provide specified medical treatment

for a child is not for that reason alone a negligent parent.

5. Conviction of the parent or parents for commission of a felony, if the facts of the crime are of such a nature as to indicate the unfitness of the parent or parents to provide adequate care and control to the extent necessary for the child's physical, mental or emotional health and development.

6. Unexplained injury or death of a sibling of the child.

7. Inability of appropriate public or private agencies to reunite the family despite reasonable efforts on the part of the agencies. (Added to NRS by 1981, 1751)

NRS 128.107 Specific considerations where child is not in physical custody of parent. If a child is not in the physical custody of the parent or parents,

the court in determining whether parental rights should be terminated, shall consider, without limitation:

1. The services provided or offered to the parent or parents to facilitate a reunion with the child.

2. The physical, mental or emotional condition and needs of the child and his desires regarding the termination, if the court determines he is of sufficient capacity to express his desires.

3. The effort the parent or parents have made to adjust their circumstances, conduct or conditions to make it in the child's best interest to return him to his home after a reasonable length of time, including but not limited to:

(a) The payment of a reasonable portion of substitute physical care and maintenance, if financially able;

(b) The maintenance of regular visita-

tion or other contact with the child which was designed and carried out in a plan to reunite the child with the parent or parents; and

(c) The maintenance of regular contact and communication with the custodian of the child.

4. Whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent or parents within a predictable period of time.

For purposes of this section, the court shall disregard incidental contributions, contacts and communications.

(Added to NRS by 1981, 1751)